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756-067—64——1

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 544

ARROW TRANSPORTATION COMPANY, ET AL., APPELLANTS

v.

THE CINCINNATI, NEW ORLEANS, & TEXAS PACIFIC RAILWAY COMPANY, ET AL., APPELLEES

No. 545

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

THE CINCINNATI, NEW ORLEANS, AND TEXAS PACIFIC RAILWAY COMPANY, ET AL., APPELLEES

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

MEMORANDUM FOR THE SECRETARY OF AGRICULTURE

The Secretary of Agriculture, in intervening as a plaintiff in the District Court, acted pursuant to § 201 of the Agricultural Adjustment Act of 1938, as amended (52 Stat. 31, 36, 7 U.S.C. § 1291), and § 203 (j) of the Agricultural Marketing Act of 1946 (60 Stat. 1087, 1088–1089, 7 U.S.C. § 1622); see also, *Sec-*

retary of Agriculture v. *United States*, 347 U.S. 645, 647, fn. 1; *Secretary of Agriculture* v. *United States*, 350 U.S. 162, 163, fn. 1.

The Southern Railway System [1] filed a complaint in the District Court to set aside the order of the Interstate Commerce Commission with regard to the Southern's proposed rate reductions for the hauling of grain in multiple-car shipments to points in the Southeastern States. The Louisville and Nashville Railroad Company and other principal railroads serving the Southeastern area filed an intervening complaint to obtain judicial review of the Commission's order. Some additional parties, including the Secretary of Agriculture, intervened as plaintiffs and adopted the position of Southern.

1. The Southern's reduced rates are for shipments of not less than 450 tons of grain—90 tons per car—from one consignor to one consignee on one bill of lading.[2] The rates are constructed on a formula which contains a 240-cent minimum for distances up to 346 miles. The Southern-owned cars which would be utilized are extra large aluminum covered hopper cars with four separate compartments. At the time

[1] The Southern Railway System is composed of six railroads, *viz.*, the Southern Railway; the Cincinnati, New Orleans & Texas Pacific Company; the Alabama Great Southern Railway Company; the Georgia Southern & Florida Railroad Company; the Carolina & Northwestern Railway Company; and the New Orleans & Northeastern Railroad Company.

[2] The rates for the Louisville and Nashville Railroad and the other intervening railroads are subject to a minimum of 50 tons in conventional cars with a minimum of 450 tons per shipment.

of the administrative hearing, the Southern had approximately 500 aluminum covered hopper cars—sometimes referred to as jumbo or "Big John" cars—representing an investment of about 13 million dollars (J.S. App. 19a–20a).[3]

Each aluminum hopper car handles a revenue load in excess of 100 tons (J.S. App. 19a–20a). A standard box car has a gross weight of 128,000 pounds and a tare weight of about 24 tons (J.S. App. 84a). Grain must be loaded through the center door of a standard box car, then manually carried, by means of piping, to the ends and corners of the car, and unloaded through the center door (J.S. App. 84a). But a jumbo or "Big John" aluminum covered hopper car is loaded by means of a spout which is inserted after the watertight hatch covers are laid back, the four compartments in the car are quickly filled with grain, and the car is unloaded by opening the bottom so that the grain runs out by gravity (J.S. App. 84a). An aluminum hopper car is free from insect infestation and may be used again and again without cleaning or conditioning (J.S. App. 84a). Four types of grain may be loaded in a hopper car, whereas it is not possible in a standard car (J.S. App. 84a). A paper grain door is necessary in a standard car to prevent spillage, but it is not necessary in a hopper car (J.S. App. 84a). Aluminum cars will not rust and require minimal maintenance, although the number of tons

[3] "J.S. App." refers to the Appendix to the Jurisdictional Statement filed by the Arrow Transportation Co., *et al.*, appellants.

hauled in a 2-year period by a hopper car is more than would move in a standard car in 15 or 20 years (J.S. App. 84a). Less switching is involved in the use of a hopper car since more grain moves in fewer cars (J.S. App. 84a).

The Commission referred to the use of these large aluminum covered hopper cars as constituting a "technological achievement" (J.S. App. 20a). "We have no hesitancy in finding," said the Commission, "that the 'Big John' car represents a major breakthrough in the control of cost and a notable advance in the art of railroading" (J.S. App. 20a). The Southern should be able, according to the Commission's decision, to transport grain in these cars "at rates lower than would otherwise be prudent or lawful" (J.S. App. 20a).

The reduced rates by Southern, in the use of aluminum covered hopper cars, are of particular significance since the agricultural industry in the Southeastern area has been undergoing, in the last 25 years, basic changes which are reflected in the growth of a substantial livestock and poultry economy.[4] The grain requirements in the Southeastern area greatly exceed the local production of grain, and the deficit position requires the shipment to that area of large quantities of grain (J.S. App. 97a–98a).

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[4] Any increase in the multiple car rail rate would increase most grain transportation charges to the Southeastern area. Such an increase would be directly felt by farmers and feed mills in the area (Tr. 610–611, 973, 1413, 1452, 1473, 1743–1744, Ex. 32).

The Commission found that in 1960 the grain shipped to the Southeastern States totaled 10,719,000 tons, and of that total 6,560,000 tons moved from the producing area by motor trucks, and 4,159,000 tons moved by rail and water carriers (J.S. App. 27a). The motor trucks hauled only 700,000 tons to this area in 1955, but in 1960 they hauled "from about 4 million to more than 6 million tons and more probably nearer the latter figure" (J.S. App. 27a–28a). The percentage of grain shipped by railroad to the Southeastern region declined from 56% in 1955 to 20% in 1960, and the percentage hauled by motor trucks increased from 19% in 1955 to 60% in 1960 (J.S. App. 98a).

The proposed rates, according to Southern, are necessary "if it is to participate effectively in the grain movement" (J.S. App. 98a). "In view of our finding herein that unregulated trucking is the dominant competitive force, we are satisfied"—said the Commission—"that the Southern was motivated primarily by a desire to meet such competition and that its primary purpose was not to close the Tennessee River to barge transportation of grain" (J.S. App. 38a). Specifically, the Commission said that it agreed with the decision of Division 2, in this matter, that in view of the "magnitude and the effect of unregulated truck competition" it is "reasonable to conclude that the rates are proposed to meet such competition" (J.S. App. 39a).

The transportation of grain by motor truck is exempt from regulation as to rates by the Commission

because of § 203(b) of the Interstate Commerce Act, particularly § 203(b)(6) of the Act (49 U.S.C. § 303 (b)(6)). The Commission concluded that "regulated carriers should be given considerable leeway in meeting the competition of private and other carriers not subject to Commission regulation, particularly where such competition is clearly dominant" (J.S. App. 27a).

The movement of grain by motor trucks to the Southeastern area is widespread as to origin (J.S. App. 130a), but, in the main, it has its genesis in the Midwest, although a substantial percentage is transported by trucks from the Tennessee River ports to the processors in the Southeastern area. "Considerable grain," according to the Commission's decision, "is processed at the Tennessee River ports but virtually no grain is consumed as such at the ports," and "feed, processed from grain, is not consumed within the port area" (J.S. App. 42a).

The motor trucks which haul grain from the Midwest to the Southeastern region are engaged in a backhaul movement, that is to say, the trucks generally transport agricultural commodities—such as citrus fruits—from the Southeast to the Midwest and, as a backhaul, transport grain to the Southeastern area (see, *e.g.*, Tr. 86–87, 607, 816–819, 832, 895–897, 933, 1175, 1999, 7203, 7411–7414, 12,181–12,185). The Commission found that the "traffic is transported chiefly by private carriers as a backhaul movement, by buy-and-sell operators who commingle merchandising and transportation activities, and by for-hire carriers of

exempt agricultural commodities who haul produce out of the Southeast, principally Florida, and grain as a return load" (J.S. App. 26a).

The transportation of grain by motor trucks from the Tennessee River ports—as contradistinguished from the hauling of grain by motor trucks from the Midwest—to the processors in the Southeastern area does *not* generally involve a backhaul movement (see, *e.g.*, Tr. 6410–6411, 6984, 7010, 12,183–12,185). The grain which is hauled by motor trucks from the Tennessee River ports to the processors in the Southeastern area is *not*, generally, hauled by itinerant operators—in contradistinction to the hauling of grain from the Midwest—but in trucks which are owned by the receivers or river merchants or owned by processors or companies engaged only in hauling or processing grain (see, *e.g.*, Tr. 815–816, 6431, 7565, 10,302).[5]

2. The Southern specified a minimum rate for hauling grain up to 346 miles—which includes, of course, the Tennessee River ports—and the minimum rate was prescribed because of costs incident to the utiliza-

[5] "Specialized equipment is used particularly for the moves to and from the river ports * * *. To describe under these conditions the movement of corn by motor carrier as 'trucking' is perhaps misleading. The larger merchandisers of corn, the elevator operators and the feed mixers include in their staff, personnel who give much of or their exclusive attention to this transportation operation. Fleets are organized, informally perhaps and [illegible] changing, but the service *is* managed [emphasis in original]." *Corn Prices and Freight Rate Developments in the Southeast and Their Meaning for Eastern Agriculture, 1962–63 Season, Progress Report No. 3* (Experiment Station, College of Agriculture, University of Massachusetts), p. 16.

tion of the aluminum cars in short hauls and in order not to "set rates any lower than necessary to participate in the business" (Tr. 1998). With respect to whether the minimum rate for shipments of grain up to 346 miles is invalid as constituting an undue advantage or undue prejudice—within the meaning of § 3(1) of the Interstate Commerce Act (49 U.S.C. § 3(1))—the Commission made the ultimate finding that:

> "No defense is available to the Southern here by reason of any substantial dissimilarity in transportation conditions as between the origins preferred and those prejudiced. Severe truck competition exists at the Tennessee River ports as well as at the Ohio and Mississippi River crossings. It is well settled that a carrier may not pick and choose the competition it will meet if the effect thereof is to create undue preference and prejudice" (J.S. App. 43a).

The minimum rate for shipments up to 346 miles was said by the Commission to be violative of § 3(1) of the Interstate Commerce Act (49 U.S.C. § 3(1)), which prohibits undue preferences or undue disadvantages (J.S. App. 40a–44a).

The Commission also concluded that the reduced rates are violative of § 1(5) of the Interstate Commerce Act (49 U.S.C. § 1(5)) as unjust and unreasonable (J.S. App. 50a). It was recognized, however, in the Commission's decision that:

> "A substantial rate reduction by the Southern has been shown to be justified for various reasons. First, the proposed reduced rates cover a less complete service and reflect econo-

> mies made possible by the development of the 'Big John' hopper car. Secondly, the huge and rapidly growing volume of grain transported by unregulated motor carriers at low and unpublished rates imperatively required some counteraction by rail management. And finally, that management was entitled to expect from the Commission considerable leeway in meeting its primary and unregulated competition.' * * * At issue here is the lawfulness of a particular level of rail grain rates" (J.S. App. 39a).

In concluding that the proposed rates "are below a minimum reasonable level" (J.S. App. 40a), the Commission said, by way of summary, that it has indicated "its approval of a broad territorial grain rate adjustment at a level approximately 53 percent lower than the preexisting level" (J.S. App. 49a). "An upward revision of the proposed adjustment by 16 percent," according to the Commission, "(1) will preserve for the bargelines the cost advantages they enjoy with respect to certain port-to-port movements; (2) will prevent the transportation of grain by rail at rates which the record indicates would not be adequately compensatory if established on a nondiscriminatory basis from the Tennessee River ports; and (3) will enable the Commission, the carriers, and the other affected interests to determine more clearly, in the light of actual experience, whether a further rail rate reduction is required to meet unregulated truck competition and can be justified costwise, whether such competition can be overcome on a somewhat higher level of rates, and whether the effect on

grain processors and shippers is such as to warrant modification of extension of the reduced rates to meet the needs of the grain trade" (J.S. App. 49a–50a). The proposed rates were "ordered canceled and the proceedings discontinued," but the Commission said that its action is "without prejudice to the filing of new schedules in conformity with the conclusions reached herein" (J.S. App. 50a).

3. The District Court, in reviewing the Commission's decision, concluded that the Commission's findings on the crucial issues are not supported by substantial evidence on the record as a whole (J.S. App. 12a–13a). Specifically, the District Court held that the Commission's finding of substantially similar transportation and competitive conditions, which was the basis for its ruling that the minimum rate constituted an undue preference and unreasonable prejudice in violation of § 3(1) of the Act, is without substantial support in the record as a whole. The purpose of the multiple-car rates, as shown by the record, is to make the railroads "competitive with the dominant long-distance backhaul truck movement of grain from the Middle West to the Southeast" (J.S. App. 10a). The record establishes, according to the District Court, that the motor trucks which haul grain from the Tennessee River ports have no backhaul, and there is, therefore, a necessary difference in rate (J.S. App. 10a–11a). Since the ultimate finding of the Commission lacks adequate evidentiary support, the Court said that it and the conclusion based on it must be set aside (J.S. App. 12a–13a).

The Commission's finding that Southern's rates are unjust and unreasonable under the terms of § 1(5) of the Act was also found by the District Court to be without substantial foundation on the record as a whole (J.S. App. 11a–13a). The Commission's ultimate finding in this respect is also "based on the invalid premise that Section 3(1) of the Act has been violated and on findings as to car utilization and costing procedures which are not supported by substantial evidence in the record" (J.S. App. 13a). The Commission's determination that the proposed rates must be increased in order to avoid unfair and destructive competition is also not supported by substantial evidence in the record (J.S. App. 13a).

An additional basis for the decision of the District Court is the inadequacy of the Commission's findings (J.S. App. 12a–13a). The Commission's ultimate finding with respect to the minimum rate up to 346 miles being an undue preference or an undue advantage is conflictive with findings "by the Commission that transportation conditions, as between the points of origin allegedly unduly preferred and those allegedly unduly prejudiced, are in fact not similar" (J.S. App. 12a–13a). The Commission's conclusion that the Southern's costing procedures improperly duplicated the exclusion of certain maintenance items was not supported by the necessary subsidiary findings (J.S. App. 11a–12a).

The District Court, in view of the foregoing, set aside and enjoined the Commission's order (J.S. App. 13a–14a).

4. The Secretary of Agriculture is filing this memorandum to advise the Court as to the Secretary's position on the issues presented, *viz.*, that the lower court's reversal of the Commission's decision was correct and does not present a substantial question warranting plenary consideration by this Court.

The Commission's findings with respect to the crucial issues were held by the 3-Judge District Court to lack substantial support in the record as a whole. After a lower court has reviewed the adequacy or substantiality of the evidence to determine whether the record as a whole supports findings of fact by an administrative agency, this "Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Universal Camera Corp.* v. *Labor Bd.*, 340 U.S. 474, 491. The District Court, in the case *sub judice*, carefully reviewed the record and applied familiar law in determining that the crucial findings by the administrative agency are not supported by the record as a whole.

It is only when commodities are transported "under substantially similar circumstances" that § 3(1) of the Interstate Commerce Act requires that the rates imposed be the same. *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 655. "[D]ifferences in competitive conditions justify," under § 3(1) of the statute, lower rates over one route than over another. *Barringer & Co.* v. *United States*, 319 U.S. 1, 13. "Preference or advantage, on the one hand, and prejudice or disadvantage, on the other hand, are not

unlawful. They must be 'undue or unreasonable' before they violate this provision [*i.e.*, § 3(1) of the Act]." *Atchison, Topeka and Santa Fe Ry. Co.* v. *United States*, 218 F. Supp. 359, 366 (3-Judge Court, N.D. Ill.). The Commission made the finding that, with respect to the minimum rate for shipments of not more than 346 miles, no defense is available to the Southern "by reason of any substantial dissimilarity in transportation conditions as between the origins preferred and those prejudiced" (J.S. App. 43a) and ordered that rates "no less favorable" to the Tennessee River ports than the Ohio and Mississippi River ports be promulgated (J.S. App. 44a). The significant dissimilarities are, however, plainly established by the record.

The hauling of grain by motor trucks from the Midwest is "chiefly by private carriers as a backhaul movement," according to the Commission's findings, "and by for-hire carriers of exempt agricultural commodities who haul produce out of the Southeast, principally Florida, and grain as a return load" (J.S. App. 26a; see also, Tr. 86–87, 607, 816–819, 832, 895–897, 933, 1175, 1999, 7203, 7411–7414, 12,182–12,185). But since no backhaul is available to the motor trucks in the transportation of grain from the Tennessee River ports (see, *e.g.*, Tr. 1999, 6410–6411, 6984, 7010, 12,183–12,185)—as to which the minimum railroad rate is applicable—there is a marked dissimilitude in the competitive conditions.[6] "The record estab-

[6] The "possibility of a backhaul to pick-up a low-cost movement of exempt commodities doesn't reach a serious point until somewhere out to 300 or 350 miles" (Tr. 1999).

lishes," according to the District Court, "that truck movements in relation to those ports are shorter, less than 346 miles, and made without backhaul payloads. Expenses and any profit must therefore be realized from this one-way, one pay-haul and those engaged in it cannot afford to transport commodities for gasoline money as can long-distance backhaul truckers" (J.S. App. 10a–11a).

Southern's minimum rate is not "any lower than necessary to participate in the business" (Tr. 1998). The Commission found that "unregulated trucking is the dominant competitive force," and "we are satisfied that the Southern was motivated primarily by a desire to meet such competition and that its primary purpose was not to close the Tennessee River to barge transportation of grain" (J.S. App. 38a). The Commission also concluded that "regulated carriers should be given considerable leeway in meeting the competition of private and other carriers not subject to Commission regulation, particularly where such competition is clearly dominant" (J.S. App. 27a).

The Commission also found that transportation conditions from the points determined by it respectively to be preferred and prejudiced were in fact substantially different in that, by reason of substantially lower car utilization on short-haul routes, the cost of serving those routes is substantially higher than that for serving long-haul routes (J.S. App. 48a).

The basic finding of the Commission that the minimum rate, for the Tennessee River ports, constitutes an undue prejudice or undue preference was set aside

by the lower court on the ground that the finding is not supported by substantial evidence on the record as a whole, and in the circumstances here we believe the question is so unsubstantial as to require no further consideration.

Although the Commission found that, in general for the transportation of grain, a "substantial rate reduction by the Southern has been shown to be justified for various reasons" and the "huge and rapidly growing volume of grain transported by unregulated motor carriers at low and unpublished rates imperatively required some counteraction by rail management" which is "entitled to expect from the Commission considerable leeway in meeting its primary and unregulated competition" (J.S. App. 39a), nonetheless it was concluded by the Commission that on the basis of the "cost evidence" Southern's rates "are below a minimum reasonable level" (J.S. App. 40a). The rates, said the Commission, should be increased by 16% (J.S. App. 49a–50a). The Commission's finding that Southern's rates are unjust and unreasonable under § 1(5) of the Act was found by the lower court to be lacking in substantial support on the basis of the evidence as a whole (J.S. App. 13a).

The Commission's finding is not only without adequate evidentiary support in the record, but the Commission was led to make the finding—that the rates are, in general, unjust and unreasonable—because it erroneously concluded that the minimum rate, for shipments from the Tennessee River ports, should be invalidated and set aside (J.S. App. 42a). The lower

court's determination that the Commission's finding is without adequate evidentiary support does not, in these circumstances, present a substantial issue so as to warrant further consideration, particularly in view of the Commission's statement that "[d]ifferential pricing should not be inhibited by any obsession about fully distributed costs or by any fear of casting a burden on other traffic where, as here, unregulated transportation is the dominant competitive mode. Continued reliance on carrier management to maximize profits by differential pricing, coupled with reasonable regulatory restraints, will result in more efficient use of transportation resources than either unbridled competition or controls that are excessively mechanistic or idealistic in character" (J.S. App. 36a–37a).[7]

The District Court also concluded that the Commission's findings, conflictive in some respects, are inadequate since the Commission's findings, in the main, are ultimate findings (J.S. App. 12a). The Commission failed to make preliminary or explanatory findings so as to provide an adequate foundation for the ultimate findings. But since the ultimate findings are—as we

[7] The Commission also recognized that under § 15(a)(3) of the Act "a regulated carrier should not be prevented from meeting the major competition of unregulated carriers in order to protect another mode's minor participation [the barge lines] in the traffic. * * * Since 1958, the Commission has frequently found in cases where private or unregulated transportation is the predominant competitive mode, that the indirect and incidental competitive injury inflicted by reduced rates upon regulated modes falls short of being destructive within the meaning of the act" (J.S. App. 38a).

have shown, *supra*, pp. 6–10, 13–14—without substantial evidentiary support on the basis of the record as a whole, we submit that the lower court's holding in that respect is dispositive of the case.

Contrary to the appellants' apparent suggestion, the District Court has not held that the proposed rates are lawful, but only that the Commission's order holding them unlawful is defective and cannot stand. Although we believe that the rates are lawful and have been shown to be lawful, nothing in the lower court's disposition of the case forecloses the Commission, under circumstances which it considers to be appropriate to warrant such action, from reopening the proceeding for the reception of additional evidence, the making of new and adequate findings, and the taking of such action as may be appropriate on the basis of such evidence and findings.

This is not, however, a case in which the administrative order would be sustainable if based on grounds which the record shows were available but were not the actual grounds on which it was based (see, *e.g.*, *Securities Comm'n* v. *Chenery Corp.*, 318 U.S. 80, 94–95). Nor is this case one in which the decisive findings are so shrouded in doubt that the case should be remanded to the agency for further consideration (see, *e.g.*, *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 652–655). In view of the grounds on which the District Court disposed of the case, as we have shown, *supra*, pp. 10–11, there is, we submit, no basis for a remand of the proceeding to the District Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the appeals present no substantial question and that the judgment of the District Court should be affirmed.

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